92-1758

No. 92-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HOGUE INVESTMENT CORPORATION,
an Oregon Corporation
Petitioner,

v.

ROBERT ROGER FREDINBURG
Respondent.

Petition for a Writ of Certiorari
To The Court of Appeals
For the State of Oregon

Respondent's Brief in Opposition

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QUESTION PRESENTED

1. Whether the redemption right provided to the United States under 28 U.S.C. §2410(c), for those instances where a judicial sale is given effect under state law, applies where state law does not recognize the existence of any judicial sale because of the redemption of the judgment debtor.

2. Whether the United States as the holder of an inferior lien in real estate judicially foreclosed under 28 U.S.C. §2410 can ignore state law and procedures, which amply allow it to protect its interest, in the exercise the right of redemption provided by 28 U.S.C. §2401(c).

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Respondent Robert Roger Fredinburg ("Fredinburg") submits that the writ of certiorari requested by Petitioner Hogue Investment Corporation ("Hogue") must be denied.

STATUTES INVOLVED

In addition to those statutes set forth by Hogue, Fredinburg directs the Court's attention to Oregon Revised Statutes ("O.R.S.") §23.540 through §23.600, set forth in the Appendix.

STATEMENT OF THE CASE

Hogue misstates the decision of the Oregon court of Appeals in several significant respects, thereby exaggerating its effect and importance.

First, the Court of Appeals for Oregon did not strike down the federal right of redemption granted to the United States in 28 U.S.C. §2410(c). The court simply held that the United States, pursuant to the first sentence of 28 U.S.C. §2410(c), was bound by Oregon law in exercising its right of redemption. *Appendix A of Petition* at 5a. It specifically held that under law no judicial sale was recognized and that the United States

did not take the proper yet available steps to protect its interest. *Id.* at 3a, 5a. Thus, the one-year redemption right under 28 U.S.C. §2410(c) did not apply.

Secondly, the court below did not hold that the existence of O.R.S. §23.530 defeated preemption. In fact, the court held that this statute allowed the United States to adequately protect its interests. *Id.* at 6a. "The problem here is that FDIC did nothing, even though under Oregon law it could have taken the steps necessary to permit it to exercise its right to redeem or to collect on its judgment lien". *Id.* at 5a. Thus, Hogue erroneously suggests a direct conflict between Oregon and federal law that is not present.

Third, for the same reasons, Hogue's suggestion that the FDIC "redeemed the property in strict compliance with all state procedural requirements" is equally misleading. *Petition* at 2.

Lastly, Fredinburg did not contend on appeal below that Oregon law superseded 28 U.S.C. §2410(c). Rather it was argued that since he redeemed as the judgment debtor, under Oregon law Fredinburg was restored to the estate "as if no sale had been attempted". *Kaston v. Storey,* 47 Or. 150, 153, 80 P. 217 (1905). *Franklin v. Spencer,* 309 Or. 476, 4897, 789 P.2d 643 (1990).

REASONS FOR DENYING THE PETITION

I. BASING ITS DECISION UPON THE APPLICATION OF NON-CONFLICTING STATE LAW AS EXPRESSLY REQUIRED BY 28 U.S.C. §2410(c) ITSELF, THE OREGON COURT OF APPEALS DECIDED NO IMPORTANT FEDERAL QUESTION.

In its decision, the court below recognized the doctrine of preemption and its potential application in Oregon foreclosure proceedings. *Appendix A of Petition at 3a.* However, on the facts before it the court correctly decided that preemption did not apply.

In 28 U.S.C. §2410(c), Congress has expressly made the one year redemption period subject to state law regarding the effect of judgment or decree. The first sentence of 28 U.S.C.

§2410(c) provides:

> A judgement or decree in such action or suit shall have the same effect respecting the discharge of the property from the mortgage or any other lien held by the United States as may be provided with respect to such matters by the local law of the place where the court is situated.

28 U.S.C. §2410(c). The clear import of this first sentence is the state law shall determine whether a "sale" has occurred. Thus, this Court expressly has already found no "federally imposed requirement that there *be any judicial sale at all*" under this provision. *United States v. Brosnan*, 363, U.S. 237, 245, 80 S.Ct. 1108, 4 L.Ed.2d 1192 (1960) (emphasis added) ("nothing in that section indicates when a judicial sale is to be had.").

Under Oregon law, one of the effects of the judgment is allowing the judgment debtor to redeem and avoid the judicial sale. O.R.S. §23.600, *See Appendix at 5a*. Upon this redemption, "the effect of the sale shall terminate" and the judgment debtor is restored to the estate. *Id.* Once this occurs, Oregon law deems that the judicial sale has never occurred. *Franklin v. Spencer*, 309 Or. 476, 487, 789 P.2d 643 (1990); *Kaston v. Storey*, 47 Or. 150, 153, 80 P. 217 (1905). There has been no sale in the instant case and, therefore, the one year redemption period of 28 U.S.C. §2410(c) never came into effect.

Furthermore, the United States is not relived by 28 U.S.C. §2410(c) of state law procedures for protecting its interest or preserving the redemption right. Regardless of whether a judicial sale occurs, Congress has allowed the United States to protect itself by taking such steps as state law may require.

> ***In *any case* where the debt owing the United States is due, the United States may ask, by way of affirmative relief for the foreclosure of its own lien***.

28 U.S.C. §2410(c) (emphasis added). Where the United States has "satisfied the procedural requirements" of state law, this Court has upheld its interest under this statute. *U.S. v. John Hancock Mut. L. Ins. Co.*, 364 U.S. 301, 304, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960).

In the instant case, however, the FDIC did nothing, except stipulate to a recital in the judgment and decree of foreclosure that they had a 365-day right of redemption. Under Oregon law, this method is insufficient to protect the right of redemption.

The practical effect of this failure and the redemption by Fredinburg was to extinguish the lien of the United States without a judicial sale. Since 28 U.S.C. §2410 is not the only way in which a federal lien can be extinguished, nothing improper occurred. This provision does not exclude other available state procedures. *Brosnan*, 363 U.S. at 246 (1960). Thus, like the interest of a potential lien creditor having a 60-day redemption right, it can have its interest extinguished if no sale occurs. *See i.e.* O.R.S. §23.540, *Appendix* at 1a. Consequently if the effect of Oregon law is to extinguish the lien of the United States without a judicial sale, that is certainly allowed for. There being no judicial sale, no right of redemption for the United States arose.

II. THE STATE COURT'S DECISION IS NEITHER IN CONFLICT WITH THE DECISIONS OF THIS COURT NOR ANY OF THE SEVERAL FEDERAL CIRCUIT COURTS.

No conflict in case law exists that would compel this Court's review. In that no judicial sale occurred, the court's decision below is similar to *Brosnan* and is consistent therewith. *Brosnan*, 363 U.S. at 245. Furthermore, *John Hancock Mutual L. Ins. Co.* is distinguishable in at least two respects: 1) the Kansas law expressly *excluded* all redemption rights for anyone other than the judgment debtor for one year; and 2) the United States diligently acted to protect its interest under Kansas law. *Appendix A of Petition* at 5a.

Similarly, the court below could not itself and did not create any conflict between the federal circuits. Hogue's petition admits that the Ninth Circuit in *Dupnik v. United States*, 848 F.2d 1476 (9th Cir. 1988) held against preemption in favor of a state notice procedure. *Petition* at 9. it further concedes that the Tenth Circuit's decision in *Title Ins. Co. of Minnesota v. I.R.S. of U.S.*, 963 F.2d 297 (10th Cir. 1992) turned upon preemption by a tax regulation not at issue in this case. *Id.* Lastly, the *United States v. Warford*, 791 F.2d 1519 (11th Cir. 1986), decision and the *United States v. Sizemore*, 747 F.2d 470 (9th Cir. 1984) decision are both distinguishable. Each turned on the effect under Florida and Arkansas law, respectively, of certain language in foreclosure decrees. *Id.* at 9-10. As

discussed at length herein, under Oregon law once the judgment debtor redeems no judicial sale exists regardless of reservations contained in the decree. *Infra* at 4-5.

III. THE STATE COURT'S DECISION IN CONSISTENT WITH THE CONGRESSIONAL PURPOSE BEHIND 28 U.S.C. §2410.

The Court of Appeals for Oregon recognized the importance of the congressional purpose behind 28 U.S.C. §2410(c) in protecting inferior liens of the United States. *Appendix A of Petition*, at 5a. Yet if found that if the United States had simply satisfied the requirements of Oregon law, that congressional purpose would have been more than satisfied. *Id.* at 6a. This case did not then involve the situation for which the statute was enacted, namely the United States having its lien dissolved *"without having had a chance to protect its right . . ." John Hancock Mut. L. Ins. Co.*, 364 U.S. at 305 (emphasis added).

IV. THE ISSUE RAISED IN THIS CASE TURNS UPON THE LIMITED SCOPE OF FACTS AND IT WILL AFFECT FEW OTHERS.

It should be emphasized that the FDIC, the party who attempted to redeem from the debtor, has chosen not to join in this petition. This signifies the *de minimis* effect of the Oregon Court of Appeals decision upon the rights of the federal government. Any federal agency, finding itself in the same position as the FDIC in this case, need only follow minimal procedures provided by Oregon law.

It is extremely likely in such a case that the very fact of the foreclosure will make the debt due to United States. Therefore, the United States will be able to foreclose its lien and protect its redemption rights under Oregon law. There will be little expense involved in such a procedure. It is reasonable to conclude that any interest of the United States of any significance would be protected. Neither Oregon foreclosure law nor the decision of the Oregon Court of Appeals raises any notable impediment.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari must be denied.

May 1993

Respectfully Submitted

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APPENDIX
OREGON REVISED STATUTES

23.540 Redemption by lien creditor. A lien creditor may redeem the property within 60 days from the date of the sale by paying the amount of the purchase money, with interest at the rate of 10 percent per annum thereon from the time of sale, together with the amount of any taxes which the purchaser may have paid thereon, and any other sum which the judgment debtor might be required to pay for redemption, with like interest, and if the purchaser is also a creditor having a lien prior to that of the redemptioner, the amount of such lien, with interest; provided, that if objections to any sale are filed, a lien creditor may redeem within 60 days from the date of the order confirming the sale.

23.550 Redemption from redemptioner. If the property is redeemed under ORS 23.540, any other lien creditor may, within 60 days from the last redemption, again redeem it, on paying the sum paid on the last redemption, with interest at the rate of 10 percent per annum thereon from the date of the last preceding redemption in addition, together with any taxes which the last redemptioner may have paid thereon, and, unless the lien of the lien creditor is prior to that of such redemptioner, the amount of such lien, with interest. The property may be again, and as often as any lien creditor or redemptioner is disposed, redeemed from the last previous redemptioner, within 60 days from the date of the last redemption, on paying the sum paid on the last previous redemption, with interest at the rate of 10 percent per annum, thereon, from the date of such previous redemption, together with the amount of any taxes paid thereon by such last redemptioner, and the amount of any liens held by such last redemptioner prior to the redemptioner's own, with interest.

23.560 Redemption by mortgagor, judgment debtor or successors; lien of purchaser. (1) The mortgagor or judgment debtor whose right and title were sold, or the heir, devisee or grantee of the mortgagor or judgment debtor, who has acquired by inheritance, devise, deed sale, or by virtue of

any execution or by any other means, the legal title to the property sold, may, at any time within 180 days after the date of sale, redeem the property; provided that a transfer of the judgment debtor's interest in the property, either before or after sale, shall preclude the judgment debtor from the right to redeem unless the proceeds from the sale are insufficient to satisfy the judgment, in which event the judgment debtor shall have the right to redeem at any time within 10 days after the 180 days herein allowed for redemption, and not otherwise.

(2) Redemption shall be made by paying the amount of the purchase money, with interest thereon at the rate of nine percent per annum from the date of sale, together with the amount of any taxes the purchaser may have been required to pay thereon, and any sums necessarily expended by the purchaser to prevent waste, and also all sums that the purchaser may have been required to pay on prior liens, with interest upon every such payment made by the purchaser at the rate of nine percent per annum from the date of payment thereof; subject to the set-off provided for in subsection (3) of this section.

(3) The mortgagor or judgment debtor, the heir, devisee or grantee of the mortgagor or judgment debtor shall be entitled to a set-off, against the amount necessary to be paid to redeem any property subject to redemption, for all rents, issues and profits accruing from the property sought to be redeemed while the same was in the possession of the purchaser, upon the mortgagor or judgment debtor giving to the purchaser or the purchaser's successors in interest at least 10 days' written notice to render an accounting for all rents, issues and profits accruing from the property sought to be redeemed. If the property sold is farmland, the purchaser shall have a lien on the first crops sown or grown thereon after the sale, for all sums reasonably expended by the purchaser in plowing, cultivating or seeding the premises in the usual husbandlike manner, which lien shall be superior to all other liens except the liens of laborers for work in cultivating said lands or harvesting the crops grown thereon, as now provided by law. If the premises are other than farmlands, the purchaser shall have alien on the profits thereof arising during the period of

redemption for sums necessarily expended by the purchaser to prevent waste.

(4) Within 10 days after the notice provided for in subsection (3) of this section is given, the purchaser or the purchaser's successors in interest shall file with the sheriff of the county wherein the property sought to be redeemed is situated a verified account of all rents, issues and profits accruing from, and of all sums for which the purchaser claims a lien upon the property sought to be redeemed while the same was in the possession of the purchaser or the purchaser's successors in interest. At any time within five days thereafter the judgment debtor or mortgagor shall file any objection which the judgment debtor or mortgagor may have to said account with the sheriff, who forthwith shall transmit all papers in the sheriff's possession touching upon said foreclosure, sale and redemption to the circuit court having jurisdiction, or to the judge thereof. The sums, if any, due the mortgagor or judgment debtor, or claimed by the purchaser under the purchaser's lien, shall thereafter be determined by the circuit court or the judge thereof at chambers in a summary manner at the time of redemption, and, upon such determination, the judge shall immediately return the files in the case, together with the judge's findings, to the sheriff of such county. Either party may appeal to the Court of Appeals from such determination and decision by the circuit court. An appeal by the redemptioner shall not extend the time for redemption unless the redemptioner shall, in addition to the undertaking otherwise required by law upon appeal, and within the time allowed for filing an undertaking upon appeal, give an undertaking with one or more sureties, who shall justify in like manner as bail upon arrest, that the redemptioner will fully consummate the redemption and pay such sums as shall finally be determined to be the amounts required for the redemption.

(5) As used in this section, "purchaser" or "purchaser or the purchaser's successors in interest" means the original purchaser or the original purchaser's assigns, or the purchaser's successors in interest or those holding after the purchaser or under the purchaser.

23.570 Mode of redeeming. The mode of redeeming shall be as provided in this section:

(1) The person seeking to redeem shall give the purchaser or redemptioner not less than two days' nor more than 30 days' notice of an intention to apply to the sheriff for that purpose; if with reasonable diligence personal service of such notice cannot be made within the state, then proof thereof by affidavit filed with the sheriff shall be equivalent to such personal service. At the time and place specified in the notice, which place shall be the office of the sheriff at the courthouse, such person may redeem by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate, as in the case of sale on execution, adding therein the sum paid on redemption, from whom redeemed, and the date thereof. The redemptioner shall file the certificate of redemption with the clerk of the court out of which execution issued. The clerk shall note the filing of the certificate of redemption in the court register and shall place the certificate in the case file.

(2) A party seeking to redeem shall submit to the sheriff the evidence of the right thereto as follows:

(a) Proof that the notice required by this section was given to the purchaser or redemptioner or waived.

(b) If the party is a lien creditor, a copy of the docket of the judgment or decree under which the party claims the right to redeem, certified to by the clerk of the court where such judgment or decree is docketed, or if the party seeks to redeem upon a mortgage, the certificate of the record thereof.

(c) A copy of the assignment necessary to establish the claim, verified by the affidavit of the party or agent; an affidavit by the party or agent showing the amount then actually due on the judgment, decree or mortgage.

(3) If the redemptioner or purchaser has a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the like evidence thereof and of the amount due thereon, or the same may be disregarded.

(4) When two or more persons apply to the sheriff to redeem at the same time, the sheriff shall allow the person having the prior lien to redeem first, and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed, if the person attends at the redemption; or if not, at any time thereafter when demanded. When a sheriff wrongfully refuses to allow any person to redeem, the right of the person thereto shall not be prejudiced thereby, and upon submission of the evidence and the tender of the money to the sheriff as provided in this section the sheriff may be required by order of the court or judge thereof to allow such redemption.

23.580 Court may restrain waste; what use permitted. Until the expiration of the time allows for redemption, the court, or judge thereof, may restrain the commission of waste on the property by order granted with or without notice, on the application of the purchaser or judgment creditor; but it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs to buildings thereon; or to use wood or timber on the property for the repair of fences or for fuel for the family of the person in possession of the property while the person occupies the property.

23.590 Possession after sale; right to rents or value of use. The purchaser from the day of sale until a resale or a redemption, and a redemptioner from the day of redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same is in the possession of a tenant holding under an unexpired lease, and in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period.

23.600 Conveyance to purchaser or redemptioner; effect of redemption by judgment debtor. If redemption is

not made as prescribed in ORS 23.520 to 23.590, or when redemption is made and a period of 60 days has elapsed without any other redemption, the purchaser or redemptioner shall be entitled to a conveyance from the sheriff. If the judgment debtor redeems at any time before the time for redemption expires, the effect of the sale shall terminate and the judgment debtor. if, at any time prior to the expiration of the statutory period of redemption, it is made to appear to the satisfaction of the court, that the purchaser or redemptioner has acquired the rights of all persons entitled to redeem, the court may direct the sheriff to execute a deed of conveyance to such purchaser of redemptioner forthwith, and upon the execution thereof the title of such purchaser or redemptioner shall become absolute.